

To: Jackson, Ryan[jackson.ryan@epa.gov]
From: Schwab, Justin
Sent: Fri 3/31/2017 11:06:29 PM
Subject: Re: Pebble settlement agreement

Yes, I am aware of this ongoing settlement negotiation and **Ex. 5 - Attorney Client**

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Sent from my iPhone

On Mar 31, 2017, at 6:54 PM, Jackson, Ryan <jackson.ryan@epa.gov> wrote:

Can you help me with this?

From: Thompson, Ryan [mailto:thompsonr@akingump.com]
Sent: Friday, March 31, 2017 6:05 PM
To: Jackson, Ryan <jackson.ryan@epa.gov>
Subject: Pebble settlement agreement

Ryan-

Our client, Pebble Limited Partnership, is concerned about the direction of some key issues involved in the settlement of the litigation with EPA over the preemptive veto of the Pebble mine (regarding alleged violations of the Federal Advisory Committee Act), that likely will serve as the basic framework for future permitting of the Pebble mine.

Specifically, there is concern about language now being requested by DOJ/EPA that would "sunset" the prohibition in the proposed settlement on EPA's ability to issue another preemptive veto in the future until after a full record is developed by the Army Corps of Engineers (the normal process for Section 404 CWA permits), or after four years, whichever occurs first.

Pebble believes this position would empower the Agency to utilize the same preemptive veto

process at a future point in time (i.e., after four years), regardless of whether a full administrative record on the permit application has been completed.

Needless to say, our client has no control over how quickly the USG would process a permit and therefore, the “sunset”, or four year time limit, does not make sense. Other Section 404 permit applicants are not ‘time limited’ in this manner.

Since this position seems to be at odds with the current position of the Administrator and Agency on the previous abusive use of preemptive vetoes under section 404(c) of the CWA, we wanted to bring this matter to your attention and suggest that it is critical for the Administrator to be apprised of the current positions of the parties in the settlement discussions and insure that the settlement team’s actions are consistent with the views of your Agency and the Administration.

The correspondence from Pebble’s settlement counsel to DOJ on this issue is provided below, for your review.

Let us know if you have any questions or need additional information. Happy to hop on the phone next week at your convenience to discuss if you like. Thanks!

-Ryan

Ryan Day Thompson | Senior Policy Advisor

AKIN GUMP STRAUSS HAUER & FELD LLP

Mobile: +1 202.236.7885 | thompsonr@akingump.com | akingump.com

From: Tenpas, Ronald J. [<mailto:ronald.tenpas@morganlewis.com>]
Sent: Monday, March 27, 2017 2:56 PM
To: Thurston, Robin F. (CIV) <rthursto@CIV.USDOJ.GOV>; Rosenberg, Brad (CIV) <BRosenbe@civ.usdoj.gov>; Robinson, Stuart J. (CIV) <strobins@CIV.USDOJ.GOV>
Cc: Hamilton, James <james.hamilton@morganlewis.com>
Subject: FW: Pebble Settlement Agreement

Robin,

Jim is away from the office today so I am assisting in coordinating the response to your e-mail below from last Thursday.

Thank you for your response and counter offer. We feel that we are fairly close to a resolution and we are optimistic that the parties can work together to reach an agreement. To that end, Pebble is willing to accept your proposal that it file a permit application within 30 months of the effective date of the agreement, in order to trigger the remaining timing provisions in the agreement. However, Pebble cannot agree to the provision allowing EPA to issue a Recommended Determination after the Corps issues a draft EIS or until four years have passed. Instead, Pebble continues to believe that to provide regulatory certainty and return Pebble to the normal course of permitting, EPA must agree not to issue a Recommended Determination until after the Corps issues its Statement of Findings and Record of Decision.

We are surprised that you seek to preserve the right to issue a veto before a Record of Decision is issued when the Administrator has testified that he does not think EPA should consider a veto until a full record has been developed. Response to Questions for the Record from Scott Pruitt (Jan. 18, 2017), at 196 (referring to section 404(c) and noting that “any preemptive action before the completion of a statutorily mandated process could undermine both the administrative process and rule of law”); *id.* at 216 (making clear Section 404(c) applies after the Corps issues a permit, stating “under section 404(c), EPA has the **authority to veto a Corps-issued permit** if it [sic] EPA determines the discharge will have unacceptable adverse effects”) (emphasis added).

While we understand that you would like to insert a sunset provision in the event that the Corps’ review of Pebble’s permit is “tardy” in EPA’s view, Pebble is negotiating with a single United States. EPA’s position that it may treat itself as separate and independent of the Corps is not in keeping with

the unitary Executive Branch of which EPA is a part. If, at some future point, the Corps prolongs the 404 process beyond what EPA prefers, EPA can deal with that tardiness within the Executive Branch using interagency consultation, as both agencies work for and report to the President. Ultimately, if the Corps is being unduly dilatory, the EPA will be able to secure from the White House direction to the Corps to proceed forward. If, on the other hand, EPA cannot secure such White House direction using the interagency process, that is further evidence that EPA should not proceed with the veto. The logic of proceeding in this way is further illuminated by the fact that, while Pebble has every incentive and desire to secure as rapid a course of action as possible from the Corps, Pebble has little meaningful recourse if the Corps delays the permit process. Given this disparity, the United States should bear the consequence of Corps “tardiness.” That is especially so where Corps tardiness would do no damage to the substantive outcome that EPA would be pursuing through a veto. As long as the Corps has not issued a permit no work will proceed – the very same outcome that a veto would accomplish. Thus, EPA preserving the right to veto before the Corps finishes is wholly symbolic in terms of whether work does or does not go forward at that time on the Pebble project.

Finally, it is important to underscore the fact that Pebble’s proposed settlement does not ultimately bind EPA’s statutory discretion. EPA always retains its statutory authority, post-Record of Decision, to issue a veto of the project if it believes it can support such a decision.

We look forward to your response.

Jim & Ron

Ronald J. Tenpas

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541

Direct: +1.202.739.5435 | Main: +1.202.739.3000 | Mobile: +1.202.316.8347 | Fax: +1.202.739.3001

ronald.tenpas@morganlewis.com | www.morganlewis.com

Assistant: Linda J. Ramsburg | +1.202.739.5241 | linda.ramsburg@morganlewis.com

The information contained in this e-mail message is intended only for the personal and confidential use of the recipient(s) named above. If you have received this communication in error, please notify us immediately by e-mail, and delete the original message.